IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

William W. Crawford, Trustee, *Appellant,*

v.

Washington Northern Railroad Company, Oregon-Washington Timber Company, Blazier Timber Company, Mississippi Valley Trust Company, and Union Trust Company, *Appellees.*

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

HONORABLE EDWARD E. CUSHMAN, *Judge*

APPELLEES' BRIEF

Kerr & McCord, *Solicitors for Appellant.*

Edward C. Wright, Huffer & Hayden, Snow and McCamant, *Solicitors for Appellees.*

CLARKE-RUNDELL PRINTING CO., PORTLAND

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Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

BRIEF OF APPELLEES MISSISSIPPI VALLEY TRUST COMPANY AND UNION TRUST COMPANY.

This is a suit brought for the foreclosure of two mortgages given on the 4th of June, 1910, to the Mississippi Valley Trust Company to secure a single debt. One of the mortgages was executed by the Washington Northern Railroad Company and the other by the Oregon-Washington Timber Company. There is but little dispute as to the facts and the differences between us

grow out of the inferences and legal conclusions to be drawn from facts which are substantially admitted.

On the 4th of June, 1910, the Oregon-Washington Timber Company was the owner of timber lands in Skamania County, Washington, specifically described at pages 104 and 105 of the printed record, and aggregating 10,800 acres, with a stumpage thereon supposed at that time to aggregate 397,000,000 feet of merchantable timber. On the 4th of June, 1910, it executed two mortgages on this timber land, a first mortgage of $600,000.00, and a second mortgage for $400,000.00. Both of these mortgages ran to the Mississippi Valley Trust Company, a corporation doing business at St. Louis, Missouri. The mortgages are in evidence respectively as Complainants' Exhibit "9" and Complainants' Exhibit "10". There was a provision in the first mortgage to the effect that by proceedings therein defined a second trustee might be named to share the duties and responsibilities assumed by the Mississippi Valley Trust Company. Pursuant to such stipulation arrangements were subsequently made whereby the Union Trust Company of Detroit, Michigan, became co-trustee with the Mississippi Valley Trust Company (record 287). The debt secured by the first and second mortgages of the Oregon-Washington Timber Company was evidenced by negotiable bonds each in the sum of $1,000.00, six hundred of such bonds being issued to evidence the debt secured by the first mortgage and four hundred of them to evidence the debt secured by the second mortgage.

The Washington Northern Railroad Company was the owner of a logging railroad running from the Columbia River back into the timber owned by the Oregon-Washington Timber Company, its track aggregating about twenty-three miles. It was owned and controlled by substantially the same stockholders as those who owned and controlled the Oregon-Washington Timber Company (Collins 262). On the 4th day of June, 1910, the Washington Northern Railroad Company executed a mortgage in the sum of $1,000,000.00 to the Mississippi Valley Trust Company. The debt secured by this mortgage was evidenced by one thousand bonds, numbered 1 to 1,000 respectively, each for the sum of $1,000.00.

For convenience we will hereafter in this brief speak of the Oregon-Washington Timber Company as the Timber Company and the Washington Northern Railroad Company as the Railroad Company. When we have occasion to mention the Blazier Timber Company we shall refer to it as the Blazier Company.

There was a provision contained in the two mortgages given by the Oregon-Washington Timber Company to the effect that the payment of one of the bonds of the Timber Company should have the effect to pay and retire one of the bonds of the Railroad Company, the papers thus evidencing the fact that the mortgages of the respective corporations were given to secure the same debt.

The Railroad mortgage is in evidence as Complainants' Exhibit "8". On the same day that the mortgages

were executed the Timber Company made a proposition to the Railroad Company for the purchase of the Railroad Company's bonds and this proposition was accepted by the Railroad Company. The proposition is in evidence as Complainants' Exhibit "13" and is in words and figures as follows:

"Portland, Oregon, June 4th, 1910.

Washington Northern Railroad Company,
Portland, Oregon.

Dear Sirs:

We understand that you are proposing to make certain extensions to your railroad (formerly owned by the Cape Horn Railroad Company), the result of which will be to increase our facilities for marketing the timber from our lands in Skamania County, Washington, and that you have authorized an issue of One Million Dollars ($1,000,000.00) par value first mortgage six (6) per cent gold bonds, dated the 4th day of June, 1910, due on the first day of May, 1928, and secured by a first mortgage on your railroad property.

We propose to buy from you the entire issue of One Million Dollars ($1,000,000.00) par value of said bonds and pay you therefor Four Hundred Thousand Dollars ($400,000.00) par value of our bonds, as hereinafter described, and the sum of Five Hundred and Forty Thousand Dollars ($540,000.00) in money, said money to be used for the following purposes:

One Hundred and Fifty Thousand Dollars ($150,000.00) to be used for the present or future payment or retirement of the outstanding first mortgage for One Hundred and Fifty Thousand Dollars ($150,000.00) now on your railroad property, which mortgage is now pledged as additional collateral to secure the payment of a first mortgage for the same amount on our lands and

timber in Skamania County, Washington, it being understood that both of said One Hundred and Fifty Thousand ($150,000.00) first mortgages shall be paid and released by the payment of said One Hundred and Fifty Thousand Dollars ($150,000.00).

One Hundred and Twenty-five Thousand Dollars ($125,000.00) to be used for the payment of the present floating indebtedness of the Cape Horn Railroad Company.

Two Hundred and Fifteen Thousand Dollars ($215,000.00) to be used for extensions, betterments, and equipment to your railroad property.

Fifty Thousand Dollars ($50,000.00) to be loaned by you to us on our note for that amount dated the 4th day of June, 1910. due on demand with interest from its date at the rate of six (6) per cent per annum. Said loan and interest to be repaid by us by the payment to you (until said loan and interest are paid) of fifty (50) cents on every one thousand (1000) feet, board measure, of logs taken from our timber lands in Skamania County, Washington, after January 1st, 1911, and we agree to take from said lands and ship over your railroad at least sixty million (60,000,000) feet of logs every year, beginning January 1st, 1911, until all the merchantable timber on said lands is exhausted, and upon our failure so to do and to make said payments of fifty (50) cents for every one thousand (1000) feet of logs we agree to at once pay said note and interest or the balance due or to become due thereon in cash. Said payments to be made on or before the 10th day of each month for all logs taken during the previous month.

As a further consideration for the sale to us of said One Million Dollars ($1,000,000.00) par value of your bonds, and without any new or further consideration, we agree to sell and deliver to you Four Hundred Thousand Dollars ($400,000.00) par value six (6) per cent

gold bonds issued by us dated the 4th day of June, 1910, due serially Thirty Thousand Dollars ($30,000.00) par value every six (6) months, beginning May 1st, 1922, the last $40,000 thereof maturing May 1st, 1928, and secured by second mortgage on our lands and timber in Skamania County, Washington, and secured also by Four Hundred Thousand Dollars ($400,000.00) par value of the One Million Dollars ($1,000,000.00) par value of bonds now proposed to be purchased by us from you; said Four Hundred Thousand Dollars ($400,000.-00) par value of our bonds so sold to you, however, or the proceeds of the sale thereof to be used by you only for future extensions, betterments, or equipment to your railroad, after the expenditure of the said sum of Five Hundred and Forty Thousand Dollars ($540,000.00) above mentioned.

The One Million Dollars ($1,000,000.00) par value of your bonds hereby proposed to be purchased by us are all to be executed and delivered by you to the trustee in the mortgage securing the same, and to be by said trustee duly authenticated, and Six Hundred Thousand Dollars ($600,000.00) par value thereof to be deposited with the Mississippi Valley Trust Company of St. Louis, Missouri, to be by it held in trust as security under the terms of a certain first mortgage dated June 4th, 1910, executed by us to said Mississippi Valley Trust Company to secure an issue of Six Hundred Thousand Dollars ($600,000.00) par value six (6) per cent gold bonds issued by us, and the remaining Four Hundred Thousand Dollars ($400,000.00) par value of your bonds hereby proposed to be purchased are to be deposited with the said Mississippi Valley Trust Company to be by it held in trust as security under the terms of a certain second mortgage dated June 4th, 1910, executed by us to said Trust Company to secure an issue of Four Hundred Thousand Dollars ($400,000.00)

par value second mortgage six (6) per cent gold bonds issued by us, which latter Four Hundred Thousand Dollars ($400,000.00) par value second mortgage bonds are the bonds hereinafter agreed to be sold and delivered to you.

The said sum of Five Hundred and Forty Thousand Dollars ($540,000.00) to be deposited as needed for the purposes mentioned above to your credit at said Mississippi Valley Trust Company, and to be paid out on checks signed by you and countersigned by said Trust Company for said purposes.

Your agreement to the above proposition to be indicated by your written acceptance indorsed hereon.

Yours truly,

Oregon Washington Timber Company,

By J. E. Blazier, President.

Accepted: June 4th, 1910.

Washington Northern Railroad Company,

By J. E. Blazier, President."

The testimony shows that the above contract was carried out, that the Timber Company became the owner of the entire bond issue of the Railroad Company, that bonds 1 to 600, inclusive, of the Railroad Company's issue were deposited with the Mississippi Valley Trust Company as collateral security for the first mortgage bonds of the Timber Company, and that bonds 601 to 1000, inclusive, of the Railroad Company's issue were pledged as collateral security for the payment of the second mortgage bonds of the Timber Company and that they came back into the hands of the Washington Northern Railroad Company under the contract aforesaid as collateral security for the second mortgage bonds of the Timber Company which the Railroad Company ac-

quired under the contract of June 4th, 1910, which is in evidence as Complainants' Exhibit "13".

Subsequent to the 4th day of June, 1910, the parties in control of the Railroad Company and the Timber Company organized the Blazier Company, which acquired some additional timber lands in the territory traversed by the Washington Northern Railroad Company's lines. On the 1st of March, 1912, a mortgage in the sum of $425,000.00 was given to appellant by the Railroad Company, the Timber Company, and the Blazier Company. Appellant's security included a first lien on the properties of the Blazier Company, a second lien on the properties of the Timber Company, and, as found by the lower court, and as we contend, a second lien on the properties of the Railroad Company. We think it will not be contended that appellant was an innocent purchaser of the rights which he acquired as against the Timber Company and the Railroad Company. His mortgage, which is in evidence as Complainants' Exhibit "11", expressly recites on page 23 that the property of the Timber Company is subject to the lien of the first and second mortgages executed on the 4th of June, 1910. Appellant's mortgage, on page 17, expressly recites that the property of the Railroad Company is subject to the lien of the mortgage given by the Railroad Company on the 4th of June, 1910. Appellant never acquired manual possession of any of the bonds of the Railroad Company. They have remained at all times on deposit with the Mississippi Valley Trust Company (Vierling, record 274). Although appellant's mortgage was for $425,000.00, the testimony shows that the loan made by

him was in fact only $300,000.00 (Complainants' Exhibit "30").

Thirty thousand dollars has been paid on the Timber Company's mortgage to the Mississippi Valley Trust Company and $30,000.00 has been paid on the principal of the mortgage given to appellant. The remainder of both mortgage debts is now unpaid. Interest is due from May 1st, 1912, on the mortgages given on the 4th of June, 1910, held by appellees and interest is due from September 1st, 1912, on the mortgage held by appellant.

It was provided in the mortgage given by the Railroad Company to the Mississippi Valley Trust Company that when the bonds secured by this mortgage should be paid they should either be cancelled, or at the option of the Railroad Company surrendered to the Railroad Company uncancelled. When $30,000.000 was paid on the first mortgage of the Timber Company to the Mississippi Valley Trust Company bonds to the amount of $30,000.00, secured by the first mortgage of the Timber Company were cancelled and returned to the Timber Company, and at the request of the Railroad Company bonds in a like amount were surrendered to it uncancelled. The mortgage given by the Railroad Company to appellant provides on pages 18 and 19 in part as follows:

"Now, therefore, for the consideration aforesaid, and as a part of the security furnished by the Railroad Company for the payment of the principal of and interest on the notes issued hereunder and secured hereby, the Railroad Company does hereby further sell, assign, pledge, transfer and set over to the Trustee (a) said $400,000

second mortgage bonds of the Timber Company; (b) the said $1,000,000 first mortgage bonds of the Railroad Company *as they are from time to time released and delivered, or releasable and deliverable, by the said Mississippi Valley Trust Company under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the Timber Company.*"

Appellant's mortgage also provides on page 24 as follows:

"Now, therefore, for the consideration aforesaid and as a part of the security furnished by the Timber Company for the payment of the principal of and interest on the notes issued hereunder and secured hereby, the Timber Company does hereby further sell, assign, pledge, transfer and set over to the Trustee all of its right, title and interest in, to and under its aforesaid $400,000 second mortgage bonds, and also said bonds of the Railroad Company *as they are from time to time released and delivered, or releasable and deliverable, under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the Timber Company.*"

(Complainants' Exhibit 11.)

Appellant contends that under the foregoing transfer and pledge appellant is the owner of bonds of the Railroad Company to the amount of $430,000.00 and entitled to participate with appellees in the mortgage security in the proportion which $430,000.00 bears to $570,000.00. It is the contention of appellees, and the lower court so found, that appellant is not entitled to participate in the Railroad security until the bonds held by appellees are paid in full.

It is also the contention of appellees that under the after-acquired property clause contained in the mortgage given by the Railroad Company to the Mississippi Valley Trust Company, the bonds of the Railroad Company numbered 601 to 1000, inclusive, became a part of the security of appellees for their debt amounting to $600,000.00 when the Washington Northern Railroad Company became the owner of these bonds as collateral security for the second mortgage bonds of the Oregon-Washington Timber Company pursuant to the provisions of Complainants' Exhibit "13". The lower court also ruled with appellees on this branch of their contention. As we understand it the appeal is taken in the case at bar chiefly for the purpose of reviewing these two contentions.

The remaining questions relied upon by appellant are those arising on his review of the action of the lower court in striking out certain portions of appellant's answer and cross-bill. The matter so stricken out by the lower court undertook to bring in new parties to the suit, charging that they were the owners of at least $300,000.00 in amount of the bonds represented by appellees. It was charged by appellant that the moneys arising from the bond issue of June 4th, 1910, had been diverted from the purposes prescribed in Complainants' Exhibit "13", quoted above, and expended for purposes which were beyond the corporate functions of the Washington Northern Railroad Company. It was charged that these owners of our bonds were parties to such diversion and that the facts constituted an equitable payment of a part of the debt which we represent. All of

the matters and things complained of took place prior to the time when appellant advanced his money and became the owner of a lien on the property. They furthermore did not amount to an allegation of payment, but at most constituted a counter-claim which might have been asserted by one of the mortgagor corporations at its election.

The only remaining issue in the case as tried in the court below had to do with some logging equipment purchased on a conditional contract of sale by the Washington Northern Railroad Company from the Weist Logging Company. The purchase price of this property was $80,000.00; $30,000.00 of this sum was paid from the funds of the Washington Northern Railroad Company, and the remaining $50,000.00 was paid from the funds of the Blazier Company secured on appellant's mortgage. The lower court held that the logging equipment was to be deemed the property of the Blazier Company free from the lien of appellee's Railroad mortgage and subject to the lien of appellant's mortgage. We have taken no appeal from this part of the decree of the lower court and it is our understanding that this branch of the controversy is not before the court.

POINTS AND AUTHORITIES.

I.

Where bonds or notes secured by a lien on real estate come into the hands of the debtor uncancelled, they cannot be reissued so as to rank with other bonds or notes

executed at the same time, secured by the same lien and still outstanding.

New York Security Co. v. Equitable Co., 77 Fed. 64.

Dooley v. Virginia Co., 7 Fed. Cases 913, Case No. 3999.

In Re Burton, 29 Fed. 637, 638, 640.
White v. Fisher, 62 Ill. 258, 259, 261.
Gordon v. Wansey, 21 Cal. 77, 79.
Schinkel v. Hanewinkel, 19 La. Ann. 260.
Thompson's Adm'r v. George, 5 S. W. 760.
Eastman v. Plumer, 32 N. H. 238.
Wallace v. Bank, 1 Ala. 565, 570.
Winans v. Wilkie, 41 Mich. 264; 1 N. W. 1049.
Brosseau v. Lowy, 70 N. E. 901, 904.
Lawson v. McKenzie, 44 Ia. 663.
Swem v. Newell, 19 Colo. 397; 35 Pac. 734, 735.
Kneeland v. Miles, 24 S. W. 1113, 1115 (Tex. App.)

First National Bank v. Maxfield, 83 Maine 576; 22 Atl. 479, 480.

First National Bank v. Harris, 7 Wash. 139, 142-144; 34 Pac. 466.

II.

A party whose mortgage lien is expressly made subject to a prior lien is estopped to dispute the validity of such prior lien or to question its priority.

Bronson v. La Crosse Railroad Co., 2 Wallace 283, 310.

Jerome v. McCarter, 94 U. S. 734, 736.
Central Bank v. Hazzard, 30 Fed. 484, 486.
Pratt v. Nixon, 91 Ala. 192; 8 Southern 751.
Horton v. Davis, 26 N. Y. 495.
Freeman v. Auld, 44 N. Y. 50.
Johnson v. Thompson, 129 Mass. 398, 400.

III.

It is competent for the parties to a mortgage to stipulate that after-acquired property of the mortgagor shall be subject to its lien.

Bear Lake Co. v. Garland, 164 U. S. 1, 15.

A covenant in a mortgage subjecting after-acquired property to its lien is to be interpreted like any other contract to the end that the court may declare and enforce the agreement which the parties have made.

Hickson Co. v. Gay Co., 150 N. C. 316; 63 S. E. 1045.

Parker v. New Orleans Co., 33 Fed. 693.

In Re Medina Quarry Co., 179 Fed. 929, 935-936.

Brady v. Johnson, 75 Md. 445; 26 Atl. 49, 52.

IV.

No one can be an innocent purchaser of negotiable paper under the law merchant unless he has it in his possession.

4 Am. & Eng. 2nd Ed. 310.
Muller v. Pondir, 55 N. Y. 325.

V.

The owner of a cross-demand has an election to aver it by way of set-off and counter-claim or not as he sees fit. He cannot be required to exercise such election at the instance of a second lienor.

Gillespie v. Torrance, 25 N. Y. 306, 311.
McGraw v. Pettibone, 10 Mich. 530, 537.
34 Cyc. 758.

VI.

A creditor cannot attack a corporate transaction on the ground that it is ultra vires.

Force v. Age-Herald Co., 136 Ala. 271; 33 South. 866, 868.

Especially is this true of a creditor whose rights attach subsequent to the transaction complained of.

Allis v. Jones, 45 Fed. 148, 150.
Old Dominion Co. v. Lewisohn, 210 U. S. 206.

VII.

Under the 30th Equity Rule a counter-claim cognizable at law cannot be set up in answer to a bill in equity.

Williams Co. v. Kinsey Co., 205 Fed. 375, 376.

APPELLANT'S LIEN SECOND AND SUBSEQUENT.

The principal question raised by the appeal in this case has to do with the relative rank of appellant's lien.

It is conceded that as to the properties of the Timber Company appellant's lien is subsequent to that which we represent. The third paragraph of the affirmative answer of the appellant, found in the record on pages 69 to 72, recites a stipulation contained in appellant's mortgage to the effect that the properties of the Timber Company pledged to appellant under his mortgage of March 1st, 1912, are subject to the lien of two mortgages executed on the 4th of June, 1910, by the Timber Company. While the priority of these mortgages is expressly conceded appellant contends that as to the Railroad security he is entitled to participate with appellees in the proportions and to the extent pointed out in our statement of facts.

APPELLANT POSTPONED AS TO RAILROAD SECURITY.

We think it is equally clear that appellant is postponed to appellees as to the Railroad security. The answer of appellant, found on page 59 of the record, contains the following admission:

"This defendant admits that said mortgage so executed to the said William W. Crawford, trustee, covered and embraced all of the property described and referred to in the mortgages executed by the Washington Northern Railroad Company and the Oregon-Washington Timber Company to the Mississippi Valley Trust Company under date of June 4th, 1910, and recognizes the priority of the said two mortgages as to the property described in said two mortgages."

The second paragraph of the affirmative answer of appellant, found in the record on page 67, contains the following language:

"That in the mortgage of March 1st, 1912, executed by the said several companies to this defendant Crawford, there is contained, among other provisions, the following:

" 'It is understood and hereby expressly declared: That the property of the Railroad Company is now subject to the lien of that certain mortgage deed of trust dated June 4, A. D. 1910, executed by the Railroad Company to the Mississippi Valley Trust Company, Trustee (a Missouri corporation having its principal office and place of business in the City of St. Louis in the State of Missouri), and recorded in the office of the County Auditor of Skamania County, Washington, in Book "I" of Mortgages on pages 339 to 356, both inclusive, in order to secure the payment of the principal sum of and interest on that certain issue of first mortgage six per cent gold bonds of the Railroad Company, being 1000 bonds, numbered from 1 to 1000, both inclusive, and of the denomination of $1000 each, dated as of June 4, A. D. 1910, and due May 1, A. D. 1928.' "

We believe the law to be well settled to the effect that where a party takes a mortgage expressly subsequent to the lien of a prior and subsisting mortgage he is estopped from disputing the validity and the priority of such existing mortgage.

Bronson v. La Crosse Railroad Co., 2 Wallace 283, 310.

This was a mortgage foreclosure. A third mortgagee sought to attack the validity and resist the enforcement of prior mortgages, although his own mortgage was taken subject to the prior mortgages. The court

held that his defense was untenable. Speaking through Mr. Justice Nelson the court said:

"We now come to a branch of the case which presents a more conclusive answer to all the charges, whether in allegations or in proofs of the respondents, and overrides all other views that may or can be taken of them.

"As we have seen, this third mortgage, under which the Milwaukie and Minnesota Company was formed, was executed and delivered to Barnes, the trustee, on the 22d June, 1858, to secure the payment of an issue of $2,000,000 in bonds, and a supplement to this mortgage was executed to the same trustee, on the 11th August following.

"These two mortgages, or rather one in two parts, were, in express terms, made subject, among other incumbrances mentioned, to the bonds secured by a second mortgage on the Eastern Division of the road, to the amount of one million of dollars.

"Again, the bonds issued under this third mortgage, one of which is in the proofs, have an indorsement on the back, as follows: 'State of Wisconsin, La Crosse and Milwaukee Railroad Company, third mortgage sinking fund bond, seven per cent., etc.;' subject, among other things, 'to a second mortgage on the same line of road of $1,000,000.'

"At the time this third mortgage was executed, and thus made subject to the second mortgage bonds, all these bonds had been negotiated by the company, and were in circulation in the business community. They were all negotiated in the months of September, October, November, and December, 1857. This, the company, of course, well knew at the time of the execution

of the third mortgage, and knew, also, of the circumstances attending the negotiation of them. They had received and were in the enjoyment of the avails of them, and with this knowledge, and under these circumstances, the third mortgage, and the bonds issued under it, were made in express terms subject to the payment and satisfaction of the bonds issued under the second. All persons, therefore, taking these third mortgage bonds, or coming in under the mortgage, took them and came in with a full knowledge that the mortgagor had made the security subject to the prior lien and indebtedness. Even if there had been any valid objection to these bonds under the second mortgage, it was competent for the obligor to waive them, and no better proof could be furnished of the waiver, than the acknowledgment of the full indebtedness, by making the subsequent security subject to it. This was a question that belonged to the obligor to determine for himself when giving the third mortgage; but, besides this, what right have those coming in under it to complain? They come in with full notice of the acknowledgment of the indebtedness and previous lien."

Jerome v. McCarter, 94 U. S. 734, 736.

This also was a foreclosure suit and a junior mortgagee undertook to resist the foreclosure of the prior mortgage. The court, speaking through Mr. Justice Strong, said:

"The company is estopped by the provisions of its mortgage, of which the complainant is trustee, from asserting that the entire amount of the two $500,000 mortgages, and of the receiver's mortgage, was not outstanding when the present mortgage was made. The full indebtedness was acknowledged by making the junior

mortgage expressly subject to it, and as there is no evidence that any portion of it has been paid, it is not admissible for the mortgagors or their assignees in bankruptcy to deny it now."

In further support of the principle announced in these authorities, see

Central Bank v. Hazzard, 30 Fed. 484, 486.
Pratt v. Nixon, 91 Ala. 192; 8 Southern 751.
Horton v. Davis, 26 N. Y. 495.
Freeman v. Auld, 44 N. Y. 50.
Johnson v. Thompson, 129 Mass. 398, 400.

We do not understand that appellant disputes the force and effect of the foregoing authorities. The principle announced by them is too well established to be disputed by any good lawyer. As we understand the position of appellant, his contention is that he is the owner of Railroad bonds to the amount of $430,000.00, and that he is therefore protected by the lien of the Railroad mortgage to the same extent as appellees.

APPELLANT NOT OWNER OF RAILROAD BONDS.

Appellant's rights with reference to the Railroad bonds are no other than those created by his mortgage of March 1st, 1912, which is in evidence as Complainants' Exhibit "11." Manifestly appellant could acquire no rights under that mortgage except such as the mortgagors were able to grant on the date which the mortgage bears. They did not in fact undertake to grant and assign to appellant the $430,000.00 of Railroad bonds which appellant now claims to own. The parties

without doubt understood on the 1st of March, 1912, that the lien asserted by appellees in this suit was a first and prior lien on the properties and that all of the bonds of the Railroad Company were pledged to secure the debt of appellees. We can place no other construction on the language contained in appellant's mortgage. The property transferred by the Railroad Company to appellant in and by Complainants' Exhibit "11" is listed in eight different specifications. The first seven of these specifications are unimportant for present purposes. The eighth specification, found on pages 17 to 19 of Complainants' Exhibit "11", contains the recital with reference to the priority of the mortgage of June 4th, 1910, quoted by appellant in his answer, found at page 67 of the record and heretofore set forth in this brief. It then recites that six hundred of the bonds secured by the Railroad mortgage, being bonds from 1 to 600, inclusive, were pledged as collateral security for the payment of the first mortgage bonds of the Timber Company. It then contains the following recital, found on page 18 of the Crawford mortgage:

"That 400 of the aforesaid bonds of the Railroad Company, being bonds numbered 601 to 1000, both inclusive, have been pledged or assigned as collateral security for that certain issue of second mortgage six per cent bonds of the Timber Company, aggregating the principal sum of $400,000, issued under and secured by a second mortgage deed of trust executed by the Timber Company to the said Mississippi Valley Trust Company, Trustee, under date of June 4, A. D. 1910; which said 400 bonds of the Railroad Company now held by the said Mississippi Valley Trust Company as collateral se-

curity as aforesaid, are by the terms of the said second mortgage deed of trust of the Timber Company, required to be delivered uncancelled to the Railroad Company upon its demand from time to time, in like amounts and in the order of their corresponding numbers, as the said second mortgage bonds of the Timber Company are paid;"

The mortgage then recites that the Railroad Company is the owner of the second mortgage bonds of the Timber Company and entitled to pledge the same. We quote the portion of the mortgage immediately following:

"That the Railroad Company is duly authorized and empowered to issue, use, negotiate, pledge or assign, for its corporate purposes, its said bonds as they are surrendered and delivered to it as aforesaid.

"Now, therefore, for the consideration aforesaid, and as a part of the security furnished by the Railroad Company for the payment of the principal of and interest on the notes issued hereunder and secured hereby, the Railroad Company does hereby further sell, assign, pledge, transfer and set over to the Trustee (a) said $400,000 second mortgage bonds of the Timber Company; (b) the said $1,000,000 first mortgage bonds of the Railroad Company *as they are from time to time released and delivered, or releasable and deliverable, by the said Mississippi Valley Trust Company under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the Timber Company.*"

The foregoing language is too clear to admit of construction. It was provided in the Railroad Company's

mortgage to the Mississippi Valley Trust Company that when the bonds were paid they should either be cancelled, or at the option of the Railroad Company be delivered to the Railroad Company uncancelled. The stipulation exacted by appellant was that when the bonds were paid and when they were delivered uncancelled to the Railroad Company, or when the Railroad Company was entitled to have them delivered uncancelled, then and not until then, should they become a part of the security of appellant. The court will notice that the pledge covered not $400,000.00 in amount of bonds, but the entire issue of One Million Dollars. Appellant had no more right to bonds 601 to 1000, inclusive, than he had to bonds 1 to 600, inclusive. His right in each case was to receive the bonds after they had been paid and when the mortgagor became entitled to them either cancelled or uncancelled at its option.

The property pledged and mortgaged by the Timber Company to appellant is set forth in six paragraphs found on pages 19 to 24, inclusive, of the Crawford mortgage. The sixth paragraph is the one with which we are concerned in this case. It recites that the property of the Timber Company is subject to a first and a second mortgage both executed on the 4th of June, 1910, in favor of Mississippi Valley Trust Company. It contains a recital at the close of the twenty-third and at the top of the twenty-fourth page of Complainants' Exhibit "11" as follows:

"and by and under which mortgage deed of trust the first mortgage bonds of the Railroad Company to the

aggregate amount of $400,000 face value (being bonds numbered 601-1000) have been pledged or assigned to the said Mississippi Valley Trust Company, Trustee, as further and collateral security for said second mortgage bonds of the Timber Company, but which said bonds of the Railroad Company are to be surrendered to it from time to time as the said second mortgage bonds of the Timber Company are paid, as hereinabove more fully stated."

The granting words from the Timber Company contained in the Crawford mortgage found on page 24 are as follows:

"Now, therefore, for the consideration aforesaid and as a part of the security furnished by the Timber Company for the payment of the principal of and interest on the notes issued hereunder and secured hereby, the Timber Company does hereby further sell, assign, pledge, transfer and set over to the Trustee all of its right, title and interest in, to and under its aforesaid $400,000 second mortgage bonds, and also said bonds of the Railroad Company *as they are from time to time released and delivered, or releasable and deliverable, under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the Timber Company.*"

The question of law arising on these facts is whether it is competent for a mortgagor to reissue bonds or notes secured by mortgage which have come into his hands uncancelled on payment thereof so as to permit them to rank with other bonds or notes secured by the same mortgage still outstanding in the hands of innocent purchasers. We contend that a mortgagor has no such right; that if such bonds or notes can be reissued at all

they are subsequent in rank and dignity to the original issue which has not been paid. If the rule were otherwise the security of a mortgagee would grow worse instead of better on the partial payment of the debt.

We have found no dissent in the authorities on this question. So far as our examination has gone they are unanimous to the effect that bonds or notes secured by a mortgage which have come into the hands of the mortgagor uncancelled cannot be reissued so as to rank with the original issue of bonds or notes in the matter of security under the mortgage.

New York Security Co. v. Equitable Co., 77 Fed. 64.

This is a decision passed by Circuit Judge Lacombe in the Southern District of New York. The syllabus is as follows:

"1. Mortgage Bonds-Sale of Security-Corporations.

A corporation mortgagor, coming into possession of bonds or coupons secured by its mortgage, cannot enforce them against the proceeds of sale of the mortgaged property, where such proceeds are insufficient to pay in full the other outstanding bonds and coupons secured thereby.

2. Same-Assignment-Reissue.

If a corporation mortgagor regains possession of past-due obligations, freed from any lien, and assigns without delivering them, such assignment does not constitute a reissue, and the assignee gets only the right, title and interest of the mortgagor."

Dooley v. Virginia Co., 7 Fed. Cases 913, Case No. 3999.

Asa Snyder executed five promissory notes secured by a deed of trust on some real estate in the city of Richmond. As the first three notes matured he secured the money to take them up from the defendant, and as the notes came into his possession they were delivered by him to the defendant. The defendant purchased the fourth note and the fifth note remained at the time of the litigation in the hands of the original payee, Dunlop, Moncure & Co. The register in bankruptcy held the defendant entitled to participate in the security on the basis of the first three notes which had been taken up by the maker and reissued by him to the defendant. On exceptions to the register's report the court said:

"The three negotiable notes which are the subject-matter of this controversy were due from Snyder to Dunlop, Moncure & Co. They were never indorsed to a third person by the payees. They remained to the date of their maturity evidences of indebtedness from Snyder to Dunlop, Moncure & Co., the payees named in them. They could become evidences of indebtedness from Snyder to a third person only by the payees' indorsement of them before maturity, or their assignment of them after maturity. They were not indorsed over by Dunlop, Moncure & Co. They were placed in bank by them for collection on their own account. They were so collected by the bank on account of Dunlop, Moncure & Co. As to Dunlop, Moncure & Co., they were paid. As to the payees holding the notes at maturity they were paid. The checks which were used for paying them were presented by Snyder; and the notes were delivered to Snyder on payment. As to the only persons having the property in the notes at the time of their maturity, the notes were paid. If they, as notes, were paid to the

only persons having a right to demand payment when they became payable, they were paid as to all the world. When received from the bank to Snyder they ceased to be notes due according to their tenor. They ceased to be obligations to any one according to their tenor. They ceased to be the property of the only persons who could own them, as obligations of Snyder according to their tenor; and they became the property of Snyder, not as his notes due according to their tenor and purport, but only as vouchers or evidence of a past transaction and an extinguished debt."

The defendant was therefore postponed as to the first three notes, and the security was held first applicable to the payment of the fourth and fifth notes, which had never come into the hands of the maker.

In Re Burton, 29 Fed. 637, 638, 640.

Here the District Court for the Western District for Virginia, speaking through Judge Paul, said:

"The question thus presented for decision, viz., can a bankrupt purchase and take an assignment to himself of lien debts against his estate in bankruptcy, and collect the same for his own use, out of assets in the hands of his assignee in bankruptcy, to the exclusion of subsequent lienholders is one, so far as the court is informed, that has not been judicially settled. The court, therefore, is left in its determination to the guidance of general principles, rather than to the control of established precedents.

"It is conceded that when the characters of debtor and creditor of the same debt become united in the same person the debt is extinguished. Says Pothier (1 Poth. Obl. 607);

" 'It is evident that, by the concurrence of the opposite characters of debtor and creditor in the same person, the two characters are mutually destroyed, for it is impossible to be both at once. A person can neither be his own creditor nor his own debtor. From hence, indirectly, results the extinction of the debt, when there is no other debtor; for as there can be no debt without a debtor, and the confusion having extinguished the character of debtor in the only person in whom it resided, and there being no longer any debtor, there cannot be any debt.'

"The debt not being destroyed by the discharge in bankruptcy, but the obligation to pay it continuing, when the bankrupt recognizing this obligation; voluntarily pays these debts; or compromises them with the holders; he declines to avail himself of the advantage of his discharge; he waives it as a bar to a recovery against him, and does what duty demands, and what the law (failing to plead his discharge) would compel him to do. It is clearly as complete and full satisfaction of the debts as can be made.

"One of the debts claimed in this case by the bankrupt (The Slaughter debt, No. 3) illustrates the remarkable position the bankrupt might occupy, and the gross injustice that might be done if any other rule prevailed than that just laid down by the court. This debt was paid off by an indorser; whether by the first, second, or third indorser is not shown. Suppose it was paid by the second indorser, of course he would have a right to recover of the first indorser the amount paid. But he sells and assigns the debt, of course, with all his rights, to the bankrupt, here the principal debtor. Would there be any justice in allowing this principal debtor to recover of the prior indorser the amount paid by the second in-

dorser in satisfaction of the obligation of the principal debtor? Yet this is exactly what might occur if the position contended for by counsel for the principal debtor here, E. J. Burton, be allowed as law. Again, suppose that one of three sureties had paid off the whole of this debt, he would be entitled to contribution from his two co-sureties. But he assigns his claims to the principal debtor, who purchases it. Will it be pretended that this principal debtor could or ought to be allowed to recover off of his own sureties two-thirds of a debt paid for him by a third surety? The statement of the question must answer it in the negative."

White v. Fisher, 62 Ill. 258, 259, 261.

"In this case the appellants held certain notes, executed by the firm of Fisher, Brother & Co., maturing in one, two and three years from date, each appellant holding different notes, but all secured by one mortgage, which was given by Edward M. Fisher, the senior member of the firm. When the notes, due at the end of the first year, matured, they were taken up by Edward M. Fisher, and at his request the payees, when they surrendered the notes, placed their names on the back."

Edward M. Fisher delivered them to J. M. Fisher, who contended that he was their owner, that the money used to take them up had been his money, and that he was entitled to participate in the security. The court adjudged that he did have the right to so participate but only after the other notes, still outstanding and which had never come into the hands of the principal debtor, were paid. The opinion concludes as follows:

"As the notes, after being taken up were re-issued to J. M. Fisher by the makers, as against them he would be entitled to participate in the proceeds of the mortgage,

but the notes in his hands must be postponed to those falling due at the end of the second and third years."

Gordon v. Wansey, 21 Cal. 77, 79.

Here the court said:

"This is an action upon seven promissory notes of which the plaintiff claims to be the holder by assignment. Six of these notes, payable to different parties, were assigned to one of the makers, and by him to the plaintiff. The first assignment was before and the second after maturity, and the question arises as to the effect of these assignments. * * * We are of the opinion that the transaction amounted to payment, and that the notes became functus officio, and were not revived by the assignment to the plaintiff."

Schinkel v. Hanewinkel, 19 La. Ann. 260.

The syllabus of this case is as follows:

"Where one of a series of notes, secured by mortgage, delivered by the maker, has come again into his hands, the debt evidenced by it is extinguished by confusion."

"By reissuing such note, after maturity, he may bind himself, but cannot revive the obligations of the other parties, nor the mortgage securing it, which being only an accessory to the principal debt between the maker and the payee, is extinguished with the note."

We quote the entire opinion of the court:

"Labanue, J.—On the 4th day of May, 1863, the defendant, Hermann Hanewinkel, executed three promissory notes to his own order, and endorsed by him; one for $5,000, another for $3,000, and a third one for $2,000, and to secure the payment of the same, executed a mortgage on certain city lots. The plaintiff having

become the holder of the first named note for $5,000, and of the third named note for $2,000, obtained an order of seizure and sale, and had the property sold for cash, and the proceeds of sale, amounting to $3,500, were retained by the purchaser after paying costs and charges.

"Plaintiff's counsel took a rule upon Webber, who was the holder of the $3,000 note, to show cause why the whole proceeds of sale should not be applied to the payment of the two notes sued upon, on the ground that the said $3,000 note had been returned to the maker, and was extinguished.

"Webber answered to the rule that the said note had been given to him as a collateral security by one Marchand, to secure the sum of about $1,800, and prayed that the rule be dismissed.

"The testimony shows that this $3,000 note had been in the hands of Edward Schinkel, and handed back by him to the maker, Hanewinkel, who it seems gave it to one Marchand, a note broker, who passed it to George Merz to obtain money for the maker, Hanewinkel, George Merz was paid for the note by Marchand at its maturity. Marchand says:

" 'I became the owner of this note at its maturity on my paying it. Hanewinkel came to me, and upon hearing his troubles, I offered him this note, and Webber got it from him. This occurred a couple of months after the note had been paid by me at maturity.'

"It appears then that this note had come into the hands of the maker, who re-issued it to Webber two months after maturity. Webber acquired, knowingly, an extinguished paper, and the mortgage was also ex-

tinguished, and could not be revived. C. C., Art. 3374, 2214; 4 Rob. 416; Hill v. Hall.

"Rule made absolute; judgment affirmed."

Thompson's Adm'r v. George, 5 S. W. 760.

The syllabus in this case is as follows:

"Plaintiff loaned T. $1,000, taking a note and a mortgage to secure same. This note was paid, and with the mortgage surrendered to T. Soon afterwards plaintiff loaned T. another $1,000. No new note was given, but the old note and mortgage were returned to plaintiff as security for the debt. The debtor died, and plaintiff brought action on the note and to foreclose the mortgage. The true state of facts developing on the trial, plaintiff filed an amended petition showing the whole transaction. Held, that the parol agreement that the mortgage should stand against the land is insufficient to create a lien, but that plaintiff was entitled to judgment against the administrator for the amount due him."

Eastman v. Plumer, 32 N. H. 238.

"Young and the defendant executed a note in favor of J. F. Roby, who indorsed it in blank. Plaintiff furnished Young the money to take it up and Young paid the money to the holder, took the note from him and delivered it to plaintiff. Held that the transaction constituted payment and that Young could not re-issue the note so as to bind defendant."

Wallace v. Bank, 1 Ala. 565, 570.

"If William Wallace (the maker) became the proprietor of the note in the regular course of trade, after it has become a valid security for money in the hands of the payee, it was *ipso facto* extinguished; inasmuch as it would have answered the purpose of its creation, and the

right to receive pertained to, and the obligation to pay was incumbent upon, the maker, and consequently could not have been made available."

Winans v. Wilkie, 41 Mich. 264, 1 N. W. 1049.

In this case it is held that a party who as grantee in a deed had assumed the payment of a mortgage could not take an assignment of the mortgage and then foreclose it. His assumption of the debt made him the principal debtor, and his acquisition of the mortgage extinguished it.

Brosseau v. Lowy, 70 N. E. 901, 904.

This case squarely holds that where a debt is paid by a party legally chargeable with its payment he cannot reissue the evidence of the debt and security therefor in such manner as to preserve the lien. This same principle is decided in

Lawson v. McKenzie, 44 Ia. 663.

Swem v. Newell, 19 Colo. 397, 35 Pac. 734, 735.

Here the court said:

"From the face of the note sued on, and the allegations of the complaint, it appears that Henry Sparnick was a joint maker, and the payment by him to Young, the payee, on the 2d of August, 1883, of the amount of the principal and interest then due, operated as a full satisfaction, and ended the life and existence of the note. It was thenceforth functus officio, and could not be enforced against the other joint makers. Fitch v. Hammer, 17 Colo. 591, 31 Pac. 336; Edgerly v. Emerson, 23 N. H. 555; Sprague v. Ainsworth, 40 Vt. 47; Lenoir v. Rittenhouse, 61 Miss. 400; Adams v. Drake, 11 Cush. 504; 3 Rand. Com. Paper, Sec. 1426. 'Payment by one

of several joint debtors, although it be made by him in the form of a purchase, and be accompanied by an assignment of the debt, is still a discharge of the debt.' Institution v. Hathaway, 134 Mass. 69."

Kneeland v. Miles, 24 S. W. 1113, 1115 (Tex. App.).

Here the Court said:

"When the maker of an instrument has it in his possession the presumption would be that it was paid, and he would not have the power of negotiating it, so as to bind joint promisors. Tied. Com. Paper, Sec. 294. * * * When one of two joint promisors pays off a note, it becomes non-negotiable, and it cannot be reissued so as to bind the other promisor; and it is immaterial whether the reissue was made before or after maturity."

First National Bank v. Maxfield, 83 Maine 576, 22 Atl. 479, 480.

Here the Court said:

"When commercial paper is paid by the party whose debt it appears to be, it becomes functus officio, commercially dead, and no longer retains the character that it originally had. It is then but evidence of the transaction of its commercial life; and the party seeming to be the promisor, who has paid it, may use it as evidence, in connection with other proof, to compel the real debtor to pay it."

The Supreme Court of Washington is in line with the foregoing authorities.

First National Bank v. Harris, 7 Wash. 139, 142 to 144, 34 Pac. 466.

"Appellants moved for a non-suit, on the ground that where a promissory note upon which some of the makers

are sureties only, is found, after negotiation, in the hands of the principal obligor, it is presumed to have been paid; and that if the principal obligor attempts to negotiate that note to a person having knowledge of the suretyship, the person with such knowledge obtains no title to the note as against the sureties; but the motion was denied. Nothing is better settled than the legal proposition here laid down.

"Possession by the maker of a promissory note after it has been in circulation is presumptive evidence of its payment. Hollenberg v. Lane, 47 Ark. 394 (1 S. W. Rep. 687); Turner v. Turner, 79 Cal. 565 (21 Pac. Rep. 959); Stevens v. Hannan, 86 Mich. 305 (48 N. W. Rep. 951; 49 Id. 874); McGee v. Prouty, 9 Metc. (Mass.) 547; Heald v. Davis, 11 Cush. 318; Penn v. Edwards, 50 Ala. 63; Sutphen v. Cushman, 35 Ill. 186; Walker v. Douglas, 70 Ill. 445; 2 Randolph Com. Paper, Sec. 941; Lawson's Pres. Ev., rule 75b.

"And a note coming into the hands of the maker, after payment, cannot be re-issued by him so as to bind a surety. Hopkins v. Farwell, 32 N. H. 425; Eastman v. Plumer, 32 N. H. 238; Lancey v. Clark, 64 N. Y. 209, Cason v. Heath, 86 Ga. 438 (12 S. E. Rep. 678); 2 Brandt, Suretyship, Sec. 333.

"The application of these rules to this case is evident. * * * * *

"The fact that the time allowed by the note for its payment had not expired made no difference in the presumption of payment arising from Harris' and Wheeler's possession of it; it was payable on or before January 1, 1885, so that the principals would have had the right to take it up at any time. In Stevens v. Hannan, supra, the note was of the same kind.

"Therefore, upon the proofs as they stood at the close of plaintiff's case, we think there should have been a nonsuit."

Under the terms of the Crawford mortgage appellant cannot become the owner of any of the railroad bonds until after they have become the property of the Washington Northern Railroad Company. When the bonds come into the hands of the Washington Northern Railroad Company under the foregoing line of authority it is clear that they cannot be reissued so as to rank with the other bonds of the railroad company now outstanding for which value has been given.

No other rule than the rule announced in the foregoing authorities could be workable. A considerable payment on the principal of a mortgage debt will ordinarily exhaust the security in part. If the evidence of debt surrendered when such payment is made can be reissued and rank with the unpaid portion of the same debt the lienable debt remains the same while the security is diminishing, and every part payment on account of principal to that extent alters the position of the first lienor to his disadvantage. Such a situation is not contemplated when money is loaned on mortgage bonds, nor was it contemplated by the parties to the contracts of June 4th, 1910.

AFTER-ACQUIRED PROPERTY.

It appears from Complainants' Exhibit "13," previously quoted in this brief at pages 4 to 7, that Railroad bonds 601 to 1000, inclusive, were transferred by the Railroad Company to the Timber Company and

were thereupon pledged by the Timber Company as collateral security for the payment of the second mortgage bonds of the Timber Company, and that the Timber Company's second mortgage bonds, with the Railroad bonds aforesaid as collateral to them, were thereupon sold and assigned to the Washington Northern Railroad Company. There is no dispute about these facts. Complainants' Exhibit "13" is set out in appellant's answer, pages 76 to 79 of the record. There can be no doubt that the Railroad Company by these transfers became the owner of its bonds numbered 601 to 1000, inclusive. Appellees contend, and the lower court found, that these bonds thereupon fell within the after-acquired property clause contained in the Railroad Company's mortgage to the Mississippi Valley Trust Company and that the Railroad Company could not in any manner pledge them thereafter, except subject and subsequent to the lien for $600,000.00 held and asserted by appellees.

We allege in our amended bill that the Railroad Company in and by its mortgage of June 4th, 1910,

"conveyed and transferred to the Mississippi Valley Trust Company, as trustee, in like manner all of the franchises, contracts, rights of way, easements, privileges, traffic agreements, rolling stock, cars and engines which were then owned by the Washington Northern Railroad Company, or which should be thereafter acquired by it, and also all rents, incomes, tolls and profits accruing or to accrue from the business of the Washington Northern Railroad Company, and particularly from the operation of the said property. There was also transferred and conveyed by the defendant, Washington Northern Railroad Company, to Mississippi Valley Trust Company, in and

by the said mortgage, all future acquired property, whether the same was real, personal or mixed, and it was specifically provided in and by the said instrument of mortgage that the said future acquired property should be deemed to be a part of the security transferred by the said mortgage and deed of trust, and as fully embraced within the provisions thereof and subject to the lien created thereby as if the said future acquired property had been owned by the Washington Northern Railroad Company on the 4th of June, 1910, and had been specifically described and mentioned in the said mortgage and deed of trust."

(Record pages 7 and 8).

These allegations are not denied by appellant, but on the contrary the eighth paragraph of his answer contains the following admission:

"admits that said mortgage contained a provision that all after acquired property by the railroad company should become a part of the security under the said mortgage or deed of trust."

(Record 42.)

The after-acquired property clause of the Railroad Company's mortgage found on page 7 of Complainants' Exhibit "8" is as follows:

"The grant is intended to include and shall include all of the franchises, *contracts* rights of way, easements, privileges, traffic agreements, rolling stock, cars and engines *now owned by said Company or which may hereafter be acquired by it;* and also all rents, incomes, tolls and profits accruing and to accrue from its said business.

"It is the intention of these presents and it is hereby agreed, that all future acquired property, real or per-

sonal or mixed, including all future extensions, improvements or betterments of the property hereafter acquired by said Company, *shall be as fully embraced within the provisions hereof, and subject to the lien hereby created* for securing payment of all of said bonds, together with interest thereon, *as if the said property were now owned by said Company and were specifically mentioned herein.*

"Also all real property, timber and timber rights, and rolling stock of the Railroad Company of every kind and description now owned or hereafter acquired and wherever situate, and all lands, tenements, hereditaments, buildings, structures, warehouses, workshops, mills, plants and fixtures; all machinery, engines and boilers, all documents, deeds, timber contracts and leases, maps, surveys, inventories and papers relating to the real estate and timber rights and contracts conveyed hereby, now owned or hereafter acquired; and all rents, issues, and profits, earnings, and income from the property hereby conveyed; *it being the intention hereby to convey, and said Railroad Company does hereby convey, transfer and assign, all property of the above kind, nature and description, which it now owns and all which it may hereafter own or acquire in any manner.*"

The language italicized above very plainly comprehends the $400,000.00 of railroad bonds which are in issue as between the appellant and complainants. They were certainly contracts and future acquired property. We do not know how it would be possible to frame a more comprehensive after acquired property clause than that above set forth. It covers "all future acquired property, real or personal or mixed." The contention of appellant is that regardless of the language contained in an after acquired property clause if the mortgagor be a

railroad company nothing will be embraced within the after acquired property clause except property appurtenant to the railroad and useful to the mortgagor in the operation of its railway line. Three authorities have been cited in support of this proposition. The first of them is

Moran v. Pittsburgh Co., 32 Fed. 878, 886.

In this case the mortgagor railroad company had executed a lease of its line to a lessee of financial responsibility. One of the provisions of the lease required the lessee to pay interest on the bonds secured by a mortgage which covered the railroad. On the foreclosure of this mortgage the court held that this covenant in the lease did not pass to the foreclosure purchaser under the after acquired property clause because the debt evidenced by the bonds was extinguished by the foreclosure and no longer bore interest and also because the foreclosure operated as an eviction of the lessee. We have carefully read this case and have been unable to find anything in the case, as reported, which supports the legal proposition relied on by appellant.

One of the other cases is

Mallory v. Maryland Glass Co., 131 Fed. 111.

This was a case in which the mortgage covered a stock of merchandise changing from time to time and an attempt was made to cover after acquired personal property purchased in keeping up the stock and substituted for the merchandise in the store at the time when the mortgage was executed. The Federal Court sitting in Maryland cited a line of Maryland authorities to the

effect that this character of mortgage was void under the Maryland law and the Federal Court followed these Maryland authorities. The Maryland cases are in line with some Oregon cases which hold that the placing of a stock of merchandise on sale is a waiver of the lien of the mortgage covering the merchandise.

Aiken v. Pascall, 19 Ore. 493.
Orton v. Orton, 7 Ore. 479.

The above case in 131 Federal cited on behalf of appellant, as we read it, turns on a question of law in no wise material to the present controversy.

The third case, and the one on which appellant chiefly relies, is

Mississippi Company v. Chicago Company, 58 Miss. 902.

As we read this decision it does not hold that the after acquired property clause in a railway mortgage will be confined by operation of law to property useful in the operation of a railroad. It does hold that general words in an after acquired property clause covering all property which the mortgagor may thereafter acquire are void for uncertainty. We think the Mississippi case stands alone in American case law on this subject.

It has been determined by the Federal Supreme Court many times that an after acquired property clause will be enforced and that such a clause covers all property embraced within the general terms used.

Bear Lake Company v. Garland, 164 U. S. 1, 15.

In the nature of things it is not possible to describe after acquired property with the same particularity as property in existence at the time when the mortgage is written. An examination of the authorities will show the court that the after acquired property clause in a mortgage is interpreted by the courts like all other contracts and that property acquired by the mortgagor subsequent to the mortgage properly falling within the description contained in the after acquired property clause becomes immediately subject to the mortgage lien.

Hickson Company v. Gay Company, 150 N. C. 316; 63 S. E. 1045.

In this case the after acquired property clause was as follows:

"Also all the property, real, personal, or mixed, wheresoever the same is situated, now owned by the Gay Lumber Company, or shall be owned during the continuance of the liability hereinafter mentioned."

The question was raised as to whether the mortgage covered property purchased by the mortgagor subsequent to the date of the mortgage with money of the mortgagor, borrowed from a second mortgagor who contested the validity of the after acquired property clause. The court held that this property was subject to the mortgage, using the following language:

"The concensus of authority leads us to conclude that the terms employed in the Pou mortgage are sufficient to embrace the after-acquired lands and personal property of the mortgagor.

"The words being sufficient, we will next consider the validity of such a mortgage. It is well understood

that at common law nothing can be mortgaged that is not in existence and does not at the time belong to the mortgagor, for a person cannot convey that which he does not own; but it is now well settled that equity will give effect to a contract to convey future-acquired property, whether real or personal. Equity considers that done which the mortgagor has agreed to do, and treats the mortgage as already attaching to the newly acquired property as it comes into the mortgagor's hands. 'It is settled that such a clause is valid,' says Mr. Justice Brewer in Trust Co. v. Kneeland, 138 U. S. 419, 11 Sup. Ct. 358, 34 L. Ed. 1014. 'A clause in a mortgage which subjects subsequently acquired property to the lien of the mortgage is a valid clause,' says Mr. Justice Peckham, in Bear Lake Co. vs. Garland, 164 U. S. 15, 17 Sup. Ct. 10, 41 L. Ed. 327."

Parker v. New Orleans Co., 33 Fed. 693.

The after acquired property clause involved in the above case was much narrower than the one with which we are concerned. It read as follows: (See page 695.)

"Also all other property, real and personal, of every description and kind whatsoever, and wheresoever situated in the state of Louisiana, which is now owned, or shall be hereafter acquired, by said company, and which shall be appurtenant to, or necessary for the operation of, said main line of railroad, or any of said branches. Also all the tenements, hereditaments, and appurtenances thereunto belonging, and all of the estate, right, title, and interest, legal and equitable, of the said company and its successors and assign therein, together with the corporate franchises and privileges of said company, at any time granted, or to be granted, by the state of Louisiana relative to the construction, operation, or use of said railroad within said state."

Under this language the Federal Court for the Western District of Louisiana held subject to the mortgage lien a land grant in no wise connected with the operation of the railway.

In re Medina Quarry Company, 179 Fed. 929, 935-936.

Under general language contained in an after acquired property clause the court in the above case held subject to the mortgage two pieces of real estate in no wise connected with the quarry business and also certain profits earned by the mortgagor company in a business conducted by it in violation of law.

In line with the foregoing authorities see

Brady v. Johnson, 75 Md. 445; 26 Atl. 49, 52.

All of the foregoing authorities sustain our contention that the question of what is included in the after acquired property clause of a mortgage is dependent upon the language used and that where the language is clear and comprehensive it will be given effect according to its usual meaning.

If such be the rule of law we cannot see any escape from the conclusion found by the lower court that the Railroad Company's bonds numbered 601 to 1000, inclusive, became a part of our security when they were reassigned to the Railroad Company as collateral for the second mortgage bonds of the Timber Company.

Complainants' Exhibit "13", being the contract entered into between the Railroad Company and the Timber Company under date of June 4th, 1910, expressly

provided that the second mortgage bonds, with their collateral, were "to be used only for future extensions, betterments, or equipment" for the railroad. This contract is incorporated in the records of the Oregon-Washington Timber Company, Complainants' Exhibit "33", and the testimony shows without contradiction (Collins 264) that the record book of the Oregon-Washington Timber Company was in the possession of Messrs. Zane, Busby & Weber, attorneys who represented appellant at the time when his loan was made to the Timber Company and to the Railroad Company. There is in evidence as Complainants' Exhibit "29", a letter from Zane, Busby & Weber, of date March 26th, 1912, returning these record books to J. E. Blazier. The testimony of Mr. Collins is to the effect that the record book in question was in the possession of these gentlemen for a month prior to March 26th, 1912, and the testimony also shows that although appellant's mortgage bears date of March 1st, 1912, the moneys arising under it were not disbursed until the month of April, 1912.

It is therefore apparent that appellant took his mortgage with notice of the agreement entered into between the two mortgagor corporations to the effect that the second mortgage bonds of the Timber Company and the Railroad bonds in the sum of $400,000.00, pledged as collateral to them, were to be used only for the purpose of betterments and extensions of the Washington Northern Railroad Company. Appellant is also of course chargeable with notice of the after-acquired property clause contained in the mortgage of the Railroad Com-

pany to the Mississippi Valley Trust Company under which we claim.

Under the pleadings we are entitled to rely upon these facts. We allege in our amended bill (record 34-35) as follows:

"That it was provided in and by the agreement between Washington Northern Railroad Company and Oregon-Washington Timber Company that the second mortgage bonds of Oregon-Washington Timber Company with the collateral therefor, to-wit, bonds six hundred and one (601) to one thousand (1000) of the first mortgage bond issue of Washington Northern Railroad Company, should be sold and the proceeds thereof should be applied to the construction of additional railway lines for the Washington Northern Railroad Company into timber owned by Oregon-Washington Timber Company, and for the making of betterments and the purchase of equipment for said railroad. That your orators are advised that the said bond issue was not used for these purposes, but that the said bonds were undertaken to be pledged by the defendants, Oregon-Washington Timber Company and Washington Northern Railroad Company to the defendant, William W. Crawford, trustee, as hereinbefore set forth."

Appellant in his answer does not deny these allegations, but on the contrary in the twenty-seventh paragraph of his answer (record 61-62) we find this language:

"This defendant admits that it was provided in a certain agreement, dated June 4th, 1910, of the Washington Northern Railroad Company and the Oregon-Washington Timber Company, that the proceeds of the

sale of the $400,000 of second mortgage bonds of the timber company should be used for future extensions and betterments or equipments of the railroad company, after the expenditure of the proceeds of the sale of the $600,000 of first mortgage bonds of the timber company. But in this connection this defendant avers that the $400,000 second mortgage bonds of the timber company were pledged under the mortgage to the defendant William W. Crawford, trustee, by the joint action of the Washington Northern Railroad Company and the Oregon-Washington Timber Company."

It is true, as alleged in appellant's answer, that the Railroad Company and the Timber Company undertook to give appellant certain rights with reference to the bonds in question, but it was beyond their power to take these bonds out of the operation of the after-acquired property clause in the Railroad Company's mortgage. The bondholders whom we represent had acquired a lien upon the bonds in question as a part of their security and the mortgagor corporations could not give appellant any other than a second lien on these securities.

The contract rights of the Railroad Company arising under this agreement of June 4th, 1910, with the Timber Company were valuable rights which enured particularly for the benefit of the bondholders. If the $400,000.00 block of bonds had been marketed and the money used in the construction of extensions and betterments to the railroad there would have been an enhancement of the security commensurate with the increase in the debt. The use of the bonds for another purpose involving as it

did no enhancement in our security was prejudicial to the interests of our bondholders and cannot be upheld without our consent under the after-acquired property clause of the Railroad Company's mortgage.

In the opinion passed by the lower court on the merits, found in the record at page 171, et seq., the court discusses the effect of the after-acquired property clause in the Railroad Company's mortgage and demonstrates, as it seems to us, beyond all controversy the correctness of the position for which we contend. It would serve no useful purpose to reprint this opinion in our brief, but we commend it to the Appellate Court as a clearer and more cogent statement of the law than any that we are able to formulate.

Before leaving this branch of the case we desire again to emphasize the fact that the appellant never at any time had manual possession of the bonds in question. They have at all times been in the custody of the Mississippi Valley Trust Company (Vierling, record 274). Appellant never acquired any rights with reference thereto, except under his mortgage of March 1st, 1912, and particularly under the grants found on pages 18 and 19 and page 24 of his mortgage, which is in evidence as Complainants' Exhibit "11". The Railroad Company and the Timber Company did not have the power on the 1st of March, 1912, to make appellant the owner of these railroad bonds and they did not undertake to do so. Under the plain terms of his mortgage appellant acquired no right whatever in or to these bonds until after they had been paid and were subject to re-issue by the

Railroad Company. We have sufficiently discussed the legal effect of such re-issue if it had taken place.

MATTERS STRICKEN FROM ANSWER AND CROSS-BILL.

On the filing of appellant's answer in the court below we moved to strike out all of paragraph five of the affirmative defense, with the exception of the portions printed on pages 163 and 164 of the record. We also moved to strike out paragraphs six, seven, eight, nine, and ten of the said affirmative defense. A similar motion was filed by us directed against paragraph seven of the cross-bill, portions of paragraph fifteen, and all of paragraphs sixteen, seventeen, and eighteen. The portions of the answer moved against are those portions beginning at the first paragraph of page 75 of the record, down to the prayer on page 90 of the record. Paragraph seven of the cross-bill moved against by us is found on page 93 of the record. The remainder of the matter in the cross-bill moved against begins at the paragraph at the foot of page 128 of the record and runs down to the end of paragraph eighteen on page 141 of the record. It will be unnecessary we think to discuss these portions of appellant's pleadings in any detail.

These allegations are directed to two ultimate matters of defense:

1. It is alleged that the moneys arising from the loan floated on the 4th of June, 1910, with the knowledge and consent of a portion of the bondholders whom we represent, were disbursed in a manner contrary to the

contract between the Timber Company and the Railroad Company, of date June 4th, 1910, and in evidence as Complainants' Exhibit "13". It is not alleged that these moneys were stolen or improperly expended in any manner except that instead of being spent for the benefit of the Railroad Company they were spent for the benefit of the Timber Company. It is not alleged that all of the bondholders whom we represent had knowledge of the alleged diversion of these funds.

2. It is alleged that long subsequent to the making of our loan $150,000.00 of the funds of the Railroad Company and the Timber Company were expended in the purchase by the Railroad Company of its own stock and that a portion of the bondholders protected by the mortgages of appellees received a part of this money. It sufficiently appears that the alleged diversion of the said funds took place long subsequent to June 4th, 1910, and prior to March 1st, 1912, when appellant's rights attached.

We think this matter was properly stricken from appellant's answer for the following reasons:

1. The legal effect of the transactions alleged is not to create a defense to the foreclosure suit but to create a debt owing by the timber company to the railroad company coupled with a right on the part of the railroad company to assert an equitable charge or lien for this debt on the property purchased for the timber company.

2. The defense is essentially an allegation of ultra vires, and this proposition is not available to a creditor,

and especially not available to a creditor whose debt was not in existence at the time of the acts complained of.

3. Although the transactions are undertaken to be pleaded as an estoppel, they are in fact, if material at all, a setoff or counterclaim, and the Washington Northern Railroad Company has an election whether to assert this setoff or counterclaim in the case at bar. A subsequent mortgagee has no right to assert this election for it. The Railroad Company may be of the opinion that the mortgage security involved in this litigation will be foreclosed upon and lost in any event, and that this counterclaim can be more effectually and wisely asserted in an independent suit. In any event the election is with the Railroad Company and not with a subsequent creditor of the Railroad Company.

4. If the matter moved against is valid at all it sets up a cause of action cognizable at law and not in equity, and therefore improper to be set up in this suit under the 30th Equity Rule.

5. Appellant is not the owner of the setoff or counterclaim undertaken to be alleged, and for that reason the setoff or counterclaim is improperly pleaded in his answer, and cannot be asserted therein consistently with the 30th Equity Rule.

6. The claim asserted is not against the complainants, and its assertion in this suit is therefore in conflict with the 30th Equity Rule.

7. The claim admittedly affects only a portion of the bondholders for whom complainants are suing. It is

inequitable that other bondholders to whom this litigation is immaterial should be delayed in the collection of moneys justly due them by this litigation in which they are not interested.

8. The defendant Crawford, as appears from paragraph II of his affirmative answer, took his mortgage expressly subject to the mortgage given by Washington Northern Railroad Company to Mississippi Valley Trust Company, and expressly subject, as appears by paragrah III of his affirmative answer, to the mortgage given by Oregon-Washington Timber Company to Mississippi Valley Trust Company, and now held by complainants, and for this reason he cannot be heard to dispute the validity of the said mortgages or the amount due thereon.

We think the statement of the foregoing points is substantially all that is needed to defend the action of the court below. It is surely not necessary for us to print an argument in this brief to the effect that appellant cannot be heard to complain of transactions in the conduct of the affairs of the mortgagor corporations which took place prior to the time when his rights attached. The able solicitor who represents appellant will certainly not seriously contend that a subsequent creditor of a corporation is entitled to be heard in a court of equity to redress wrongs done the corporation prior to the time when he loaned his money and acquired his lien.

It is apparent from a reading of the portions of the answer stricken out by the lower court that the allegations amount at most to the statement of a setoff or

counterclaim which might be alleged by the Railroad Company as against the Timber Company and a setoff or counter claim which might be alleged by either or both of these mortgagor corporations against certain individuals not parties to the suit, but whom appellant desired to bring in by a cross-bill. Appellant is not the owner of either of these counterclaims. If they have any existence at all they are the property of the Railroad Company in the one case and of the Railroad Company and the Timber Company in the other case. These corporations have an election to assert their claims as a setoff in this suit or not as they see fit. They cannot be compelled to exercise such election at the instance of appellant or any other creditor.

34 Cyc. 758.

An excellent case supporting this branch of our argument is

Gillespie v. Torrance, 25 N. Y. 306, 311.

This was a case in which a surety undertook to set up a counterclaim running in favor of his principal and against the plaintiff in an action brought to enforce the joint obligation of principal and surety. The court said:

"Now it is not easy to reconcile with these established principles the right of the defendant in this suit to avail himself of the claim which Van Pelt may have against the plaintiffs on a breach of warranty. 1. Such damages constitute a counter-claim, and not a mere failure of consideration, and not being due to the defendant, cannot be claimed by him. (Code, Sec. 150; Lemon v. Trull, 13 How. Pr., 248; 16 id., 576, note.) 2. Van Pelt has a right of election whether the damages shall

be claimed by way of recoupment in the suit on the note, or reserved for a cross-action. The defendant cannot make this election for him. 3. If the defendant has a right to set up the counter-claim, and have it allowed, in this action, it must bar any future action by Van Pelt for the breach of warranty; and as no balance could be found in defendant's favor, he might thus bar a large claim in canceling a small one. If the right exists in this case, it would equally exist if the note was but $100 instead of $1,800. 4. Supposing the other notes given for the timber to have been indorsed by different persons, for the accommodation of Van Pelt, and all to remain unpaid, each of the indorsers would have the same rights as the defendant. If they were to set up the same defense, how would the conflicting claims be reconciled?"

To the same effect see

McGraw v. Pettibone, 10 Mich. 530, 537.

A large part of the matter stricken out of appellant's pleadings is an attempt on his part to set up that certain acts were ultra vires of the Washington Northern Railroad Company. We understand the law to be that the defense of ultra vires is not available to a creditor.

Force v. Age-Herald Co., 136 Ala. 271; 33 South. 866, 868.

"A creditor cannot attack a corporate transaction on the ground that it is ultra vires merely, where no fraud is charged. This right is confined to the corporation itself, or, where it refuses to act, to the stockholder, or, in a proper case, to the state."

It should be remembered in this connection that the acts complained of cannot be held to constitute a fraud

on appellant. He is a creditor both of the Railroad Company and of the Timber Company, and the diversion of assets from one of these corporations to the other cannot be held to have damaged him in his capacity as creditor. The matter alleged in his answer is a plea of ultra vires and not a plea of fraud.

Especially is the plea of ultra vires unavailable to a subsequent creditor whose rights attach subsequent to the acts complained of.

Allis v. Jones, 45 Fed. 148, 150.
Old Dominion Co. v. Lewisohn, 210 U. S. 206.

We think finally that the 30th Equity Rule is fatal to the contention of appellant that the matters moved against are available to him in the case at bar. This Equity Rule is in part as follows:

"The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."

The rule would seem to be perfectly clear and to require no judicial construction, but the rule has been construed by the United States District Court for the Western District of New York.

Williams Co. v. Kinsey Co., 205 Fed. 375, 376.

This was a suit brought for the infringement of a patent. The defendant set up allegations of unfair trade on the part of the plaintiff, and predicated damages to defendant thereon. In that case the defendant asserting the damages was the owner thereof, and the plaintiff was the party against whom the damages were asserted. The case was, therefore, stronger in both these particulars than the case of appellant with which we are concerned. It was nevertheless held that the counterclaim averred could not be litigated in the suit in equity. This holding seems to have been based on the fact that it was unconnected with the subject matter of the suit, and was cognizable at law rather than in equity.

Motion Picture Co. v. Eclair Co., 208 Fed. 416, 418.

In the above case it was squarely held by the United States District Court for the District of New Jersey that a counterclaim in order to be entertained in a suit in equity must be of equitable cognizance.

We think the 30th Equity Rule is decisive of the question now under consideration for the following reasons:

1. The set-offs averred do not belong to appellant, and therefore could not be asserted by him as the subject of an independent suit in equity.

2. The claims asserted do not run against the complainants, or either of them.

3. The claims asserted are cognizable at law and could not in any event be the subject matter of a suit in equity.

4. Neither of the claims arises out of the subject matter of the foreclosure suit.

The opinions of the lower court on the motion to strike, found in the record on pages 304 to 320, and on the merits, found in the record pages 171 to 178, show a thorough grasp of the complicated facts of this case and a careful, painstaking study of the briefs submitted by counsel. We submit the case in confidence that this court will find that the consideration of the case in the lower court has been thorough and the conclusions reached sound and accurate.

We have been obliged to print this brief before reading the brief of the appellant. The case was thoroughly argued by solicitors for appellant in the lower court and we have assumed that the argument and authorities to be relied on in this court will be identical with those in the court below.

APPELLANT'S BRIEF.

Since the foregoing argument was placed in the hands of the printer we have been served with appellant's brief. Every defense relied on by appellant is based on the assumption that appellant is the owner and bona fide holder of railroad bonds to the amount of $400,000.00. It is apparent that appellant is not a bona fide holder of these bonds for the following reasons:

1. The bonds are and always have been in the manual possession of the Mississippi Valley Trust Company. (Vierling 274). Under the Negotiable Instruments

Act in force in Oregon, where the bonds were executed, in Washington, where the security is situate, and in Missouri, where the bonds are payable, this circumstance is fatal to appellant's contention that he is a bona fide holder.

Lord's Oregon Laws, Sec. 6023.
Remington & Ballinger's Code, Sec. 3581.
3 Missouri Revised Statutes of 1909, Sec. 10160.

2. Appellant advanced his money and took whatever security he possesses with full notice of the rights asserted by appellees. (Complainants' Exhibit 11, p. 17 and 23.)

3. Appellant advanced his money with full notice of the agreement of June 4, 1910, to the effect that this block of railroad bonds should be sold only for the purpose of building extensions to the railroad property. (Collins 263; Complainants' Exhibits 29 and 34.)

4. By the express language of his mortgage (Complainants' Exhibit 11, pp. 18 and 19) appellant was not to become entitled to any of the railway bonds until they had been paid off and had come back into the hands of the mortgagor.

APPELLANT SUBSEQUENT TO APPELLEES IN RAILROAD SECURITY.

On page 50 of appellant's brief there is an admission that the authorities cited by the Lower Court support the conclusion of the Court that bonds which have once been paid and delivered to the mortgagor uncan-

celled cannot be reissued so as to rank in dignity with other bonds originally issued and still outstanding. We have cited a long line of authority to support our contention to this effect, and no authorities are cited to the contrary by appellant. The admission on page 50 indicates clearly that solicitor for appellant is convinced of the correctness of our position on this question of law. A lawyer of the ability and experience of the solicitor for appellant could scarcely reach a different conclusion. It should therefore be emphasized and borne in mind continually in the consideration of every question raised by appellant that bonds reissued by the mortgagor are inferior in dignity and priority to bonds of the original issue still outstanding. At the risk of tiring the Court with a repetition of that to which we have already several times directed attention we quote from pages 18 and 19 of the Crawford mortgage:

"That the Railroad Company is duly authorized and empowered to issue, use, negotiate, pledge, or assign, for its corporate purposes, its said bonds as they are surrendered and delivered to it as aforesaid.

"Now, therefore, for the consideration aforesaid, and as a part of the security furnished by the Railroad Company for the payment of the principal of and interest on the notes issued hereunder and secured hereby, *the Railroad Company does hereby further sell,* assign, pledge, transfer and set over to the Trustee (a) said $400,000 second mortgage bonds of the Timber Company; (b) *the said $1,000,000 first mortgage bonds of the Railroad Company as they are from time to time re-*

leased and delivered, or releasable and deliverable, by the said Mississippi Valley Trust Company under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the Timber Company."

Appellant has no rights whatever to railroad bonds except those created by the foregoing grant. Appellant's mortgagor did not attempt to give appellant any rights to these bonds except such rights as grow out of a reissue after the bonds had come into the hands of the mortgagor by payment or surrender. The argument of appellant, stated on page 50 of his brief, and elaborated at page 65, et seq., is that this provision in the Crawford mortgage should by construction be confined to the block of six hundred thousand bonds, one to six hundred inclusive, and that the $400,000 block of bonds should be eliminated from its effect. Under the law of contractual interpretation, as we understand it, the Court has no authority so to do. The rights of Mr. Crawford with reference to the $400,000 block of bonds are identical with his rights to the $600,000 block of bonds. The grant to him was a grant of bonds to the amount of $1,000,000 "as they are from time to time released and delivered, or releasable and deliverable, by the said Mississippi Valley Trust Company." If the Court were to strike out the figures $1,000,000 on the third line from the bottom of page 18 of Complainants' Exhibit 11, and insert in lieu thereof the figures $600,000, the Court would not construe the contract which the parties have made, but would make a new contract for them. We do not understand that any Court has

power so to do. Appellant's solicitor in his argument, beginning on page 65 of his brief, advances some reasons why the Crawford mortgage should have been drawn in such a manner as to limit the language found at the bottom of page 18 and the top of page 19 to bonds one to six hundred inclusive, and why a different form of transfer should have been made with reference to the $400,000 block of bonds. It is sufficient for present purposes to say that the parties concerned did not do this. The grant to appellant was a grant by the Railroad Company of $1,000,000 in bonds when the same should come back into the hands of the Railroad Company by payment or surrender, and should then be subject to reissue.

After-Acquired Property.

The argument of appellant on the subject of after-acquired property is chiefly directed to showing that the parties from and after the 4th of June, 1910, did not consider that railroad bonds 601 to 1,000 inclusive were pledged to secure our debt. His reliance on this branch of his argument is two-fold.

1. He contends that the agreement of June 4, 1910, already quoted in our brief, and found in the record at pages 130 to 133, manifests a belief on the part of the mortgagor defendants that the bonds in question could be sold on the open market, the proceeds to be used for future extensions, betterments or equipment of the railroad. It is undoubtedly true that if the bonds in question had been sold on the open market to innocent pur-

chasers who had no notice whatever of the agreement of June 4, 1910, or of the interest of the bondholders which we represent, that the bonds in question in the hands of such innocent purchasers would have been entitled to participate in the railroad security on equal terms with our bonds. It is also true that the bondholders whom we represent would probably have consented to such sale of the bonds on the open market if they had been assured that the proceeds of such sale were to be devoted to the purposes prescribed in the agreement of June 4, 1910. The construction of railway extensions, the making of betterments and the purchase of additional equipment for the railroad would have enhanced the security of our bondholders, and in consideration of such enhancement they would probably have been willing to waive this part of their security. It by no means follows that they had no interest or lien upon bonds 601 to 1,000 inclusive, nor does it follow that they should be deprived of their right to these bonds as against this appellant, whose money was not used for railway extensions or betterments.

2. Appellant's contention that the parties understood that railroad bonds 601 to 1,000 inclusive were free from the lien of our debt is based in part on the language of the collateral trust agreement of January 30, 1911. This agreement shows on its face that the mortgagor corporations at the time when the agreement was made were in need of further funds to the amount of $100,000 for the purchase of additional timber lands, and for the construction of new lines of railroad. It appears that certain gentlemen named in the

agreement, and described therein as the Syndicate, were willing to advance $100,000 for such purpose, on the terms and conditions set forth in the agreement. Paragraphs 1 and 2 of the agreement, found on pages 1 and 2, are as follows:

"The Timber Company is the owner of certain lands and property described in deed of trust from Oregon-Washington Timber Company to Mississippi Valley Trust Company, Trustee, made and entered into as of the fourth day of June, 1910, filed for record in Book "I" of Mortgages, page 296, of the records in the office of the County Auditor of the County of Skamania, in the State of Washington, on the tenth day of June, A. D. 1910, including Six hundred thousand dollars ($600,000.00) par value of the first moragage six per cent bonds of the Washington Northern Railroad Company, dated June 4, 1910, maturing May 1, 1928, secured under certain mortgage deed of trust executed by said Washington Northern Railroad Company to Mississippi Valley Trust Company as Trustee.

"Washington Northern Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Oregon, to construct, maintain and operate certain lines of railroad in its Articles of Association set forth, and is the owner of Four hundred thousand dollars ($400,000.00) par value, six per cent. gold bonds of the Oregon-Washington Timber Company, secured by a second mortgage on the lands and timber of said Timber Company in Skamania County, Washington, and secured also by four hundred thousand

dollars ($400,000) par value of six per cent. gold bonds of the Washington Northern Railroad Company, being a part of an issue of One Million Dollars ($1,000,000.00) of said bonds issued by said Railroad Company, secured by a first mortgage on its railroad property and equipment."

It will thus be seen that the agreement in question was made subject to the mortgages which we represent. The seventh paragraph of the agreement, found on pages three and four, recites that a new corporation (probably the Blazier Company) was to be organized, on whose behalf additional timber lands were to be purchased, and these lands were to be used as security for the payment of the advances made on the 30th of January, 1911, and we find at the conclusion of paragraph seven, on page four, the following:

"Shall also be and constitute a security for the repayment of the First Mortgage bonds of the Oregon-Washington Timber Company, in addition to the mortgage of said Company heretofore made to the Mississippi Valley Trust Company as Trustee."

On page ten of the agreement we find the following language:

"The bonds, mortgages, contracts, agreements, lands, timber and securities above listed, shall be conveyed or deposited under a mortgage or collateral trust agreement in form satisfactory to the Mississippi Valley Trust Company, as Trustee, for the repayment of the notes herein provided and the first mortgage bonds of the Oregon-Washington Timber Company, and shall

secure the payment of the said notes and bonds in the following order:

"First: They shall equally secure the payment of the notes for $100,000.00 as a first and prior lien.

Second: They shall equally secure the payment of the $600,000 First Mortgage bonds of the Oregon-Washington Timber Company as a second lien."

It will be seen that instead of waiving any of their rights under the securities which we are asserting in the case at bar the parties referred to as the Syndicate were insisting upon and were obtaining additional securities for the protection of the debt asserted in this suit. We cannot see how this agreement can be interpreted as a waiver of any of our rights or as an admission that our rights are other than as heretofore contended in this brief.

MOTION TO STRIKE.

We are surprised at the emphasis laid by appellant's brief on the alleged error of the lower court in striking out parts of appellant's answer and cross bill. The entire argument of appellant on this branch of his case is again based on the assumption that appellant is a bona fide holder of railroad bonds 601 to 1,000 inclusive. We think we have shown that he does not hold these bonds and will not become entitled to them at all until the debt which we represent has been paid in full and the bonds are subject to reissue by the mortgagor railroad. In support of his contention that he is entitled to raise the questions set up in the portion of his plead-

ings which were stricken out by the Lower Court appellant cites two cases:

Drury v. Cross, 7 Wall. 299.
James v. Railroad Co., 6 Wall. 752.

The first of these was a creditor's bill brought to set aside a sale made in fraud of creditors after a collusive foreclosure suit. Drury and Page, complainants in the suit, were creditors when the transactions complained of took place. James v. Railroad Company is the same sort of a case. We do not dispute the fact that a creditor whose debt is in existence at the time when properties of his debtor are fraudulently conveyed or collusively filched from him has a remedy by an appropriate creditor's bill. This principle is inapplicable to the case at bar. In order to support his contention that he is entitled to raise the questions relied upon appellant should produce authorities to show that a creditor may attack the transactions of his debtor occurring before his debt is created. He should also produce authorities to show that such contentions are germane to a foreclosure suit, and that even where the mortgagor does not elect to assert them a subsequent creditor and mortgagee is entitled to set them up as a defense. No such authorities have been cited and we believe that no such authorities can be found in the books.

It is argued that the affirmative matters of defense stricken out of appellant's pleadings by the Lower Court amount to an allegation of failure of consideration for our mortgages. We answer that if the matter in question is to be so interpreted that Mr. Crawford is not in

a position to allege it. His mortgage expressly recites the existence of the liens on which we rely. (See Complainants' Exhibit 11, p. 17 and 23). A second mortgagee whose mortgage recites the existence of a prior lien is estopped under all of the authorities from alleging that such prior mortgage was without consideration. In addition to the authorities heretofore cited on this question we call the Court's attention to the case of

Freeman v. Auld, 44 N. Y. 50, 53.

The matters and things relied on by appellant in this part of his pleading do not amount to payment. The reasons why this is so are set forth in the opinion of the Court more clearly and effectively than in any language which we can command. We quote a portion of the opinion of the Lower Court found on pages 315 and 316 of the record:

"Clearly the matters set up do not amount to payment of the bonds. To constitute payment something of agreement, or consent, actual or constructive, as to the application of credits, either on behalf of the trust company, or the bond holders, or the mortgagor would be necessary. Consent of the mortgagor might take the form of asking the application of payment of the funds theretofore wrongfully diverted or misappropriated, but where one claims through the debtor, such consent in some form is essential.

"The diversion of the funds from their authorized purpose is not a failure of consideration. The $540,000 agreed to be paid for the bonds, was the consideration therefor. It was paid and received by the mortgagor

and, if the agreement collateral to the mortgage between the railroad company and the Oregon-Washington Timber Company, as to its expenditure, was violated and more money expended for the benefit of the timber company than agreed, it cannot be said to be a failure of consideration for the bonds or mortgage securing them. When the money was paid for the bonds, the bond holders were not, thereafter, concerned or responsible for its disposition. If they were subsequently guilty of misconduct—having acquired the bonds in good faith—and not acting in a fiduciary relation thereto, it would not avoid the bonds, but be the subject matter of an independent cause of action.

Considering the matters set up in the answer as in the nature of a set off or counter claim, and putting to one side the question whether they are of such a nature as to warrant their pleading by the proper party, under Equity Rule 30, yet it is clear that they are causes of complaint which concern the railroad company in the one instance, and the railroad company and the Blazier Timber Company in the second instance, and that Crawford, as a subsequent mortgagee, does not control them—that they are not asserted by the holder of the right of action thereunder, if any.

MULTIFARIOUSNESS.

It is contended that the Court erred in permitting the railroad mortgage and the timber mortgage to be foreclosed in the same suit. It will be remembered by the Court that the two mortgages were given to

secure the same debt. We allege in our amended bill (Record, p. 24):

"That it was provided in the said mortgage given by Oregon-Washington Timber Company to your orator, Mississippi Valley Trust Company, that when the bonds secured thereby should be paid and cancelled by the trustee a like amount par value of the bonds of Washington Northern Railroad Company so conveyed and transferred as a part of the said security should be also cancelled by the trustee and returned to the Washington Northern Railroad Company, or delivered to the said Washington Northern Railroad Company uncancelled at its option."

No issue is joined on this allegation, but on the contrary appellant's answer on page 50 contains the following admission:

"This defendant admits that it was provided in the mortgage given by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company that when the bonds secured thereby should be paid and cancelled by the trustee, a like amount par value of the bonds of the Washington Northern Railroad Company, so attempted to be conveyed and transferred as part of said security, should also be cancelled by the trustee and returned to the Washington Northern Railroad Company, or delivered to the Washington Northern Railroad Company uncancelled, at its option."

In view of the fact that the two instruments secure the same debt, and that on the payment of one of the timber company's bonds a railroad bond to the same

amount is to be surrendered as paid, we cannot see how the rights of the parties can be adequately protected excepting by the foreclosure of both mortgages in the same suit. The 26th Equity Rule is as follows:

"The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."

The Lower Court adjudged that the circumstance above alluded to was a sufficient ground for uniting these two foreclosures in the same suit. It would serve no useful purpose, but would result in great and unnecessary confusion, to reverse the cause on this ground and require appellees to assert their rights in two different pieces of litigation.

ATTORNEY'S FEES.

The decree of the Lower Court on the subject of attorney's fees was supported by all of the testimony to be found in the record. Hon. Chas. W. Fulton testified that a reasonable attorney's fee for the foreclosure of this mortgage would be 5 per cent of the amount involved, both principal and interest. (Record, pp. 254-

256.) Instead of disputing this testimony the solicitor for appellant stipulated that other gentlemen of high standing at the Oregon bar should be deemed to have testified to the same effect. No testimony to the contrary was offered. This of itself is abundantly sufficient to justify the conclusion reached by the Lower Court on this branch of the controversy. The Court has by this time seen how complicated are the facts of this case and how unusual the questions of law arising herein. In view of these facts, and also in view of the circumstances which make it necessary for counsel to be employed in Tacoma, in Kansas City, and in Portland, and in view especially of the added burden created by this appeal, we think that the Court will be led irresistibly to the conclusion that the allowance made by the Lower Court should stand.

Respectfully submitted,

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F. A. HUFFER,
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